

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TZVI WEISS, et al.,	*	Case Nos. 05-CV-4622 (DLI)
	*	07-CV-0916 (DLI)
Plaintiffs,	*	
	*	Brooklyn, New York
v.	*	September 15, 2011
	*	
NATIONAL WESTMINSTER BANK,	*	
	*	
	*	
Defendant.	*	
	*	
* * * * *		

TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Proceedings commenced at 2:11 p.m.)

2 THE CLERK: Civil cause for motion hearing,
3 Weiss, et al. vs. National Westminster Bank, docket no. 05-
4 4622, Applebaum vs. National Westminster Bank, PLC, docket
5 no. 07-916.

6 Counsel, please state your appearances for the
7 record starting with plaintiff.

8 MR. ISRAEL: Good afternoon, Your Honor. Joel
9 Israel from Sales Werbner here on behalf of the Applebaum
10 plaintiffs.

11 MR. GLATTER: Good afternoon, Your Honor. Joshua
12 Glatter, OSEN LLC, on behalf of the Weiss plaintiffs.

13 MR. SCHLANGER: Aaron Schlanger, OSEN LLC, on
14 behalf of the Weiss plaintiffs.

15 MR. FRIEDMAN: Lawrence Friedman, Cleary Gottlieb
16 Steen & Hamilton, n behalf of National Westminster Bank.

17 MR. LUFT: Good afternoon, Your Honor. Avi Luft
18 of Cleary Gottlieb Steen and Hamilton, LLP on behalf of
19 National Westminster Bank.

20 THE COURT: Okay. Thank you.

21 Well, we have two motions to deal with. I've
22 looked at the submissions. They are, thankfully -- the
23 motions to compel contention interrogatories are thankfully
24 shorter than the last set I had to deal with, so I'll just
25 go through them.

1 Is there anything that the attorneys want -- if
2 you want to have a short argument before I blab on with
3 what my impressions are, I'll give you an opportunity to
4 speak.

5 So I have no preference. We'll start with the
6 defendant's motion to compel.

7 MR. FRIEDMAN: Sure, Your Honor.

8 THE COURT: Is there anything you want to add to
9 your papers?

10 MR. FRIEDMAN: The only thing I would say, Your
11 Honor, very briefly, subject to any questions Your Honor
12 has, is that we chose a template for our interrogatories
13 very deliberately, which is if you contend -- do you
14 contend X?

15 And if you contend X, then tell us the basis for that
16 contention.

17 And the plaintiffs have now told us in their
18 August 26th letter that there are things that we're asking
19 about that they say they have no idea about one way or the
20 other and they also say we can have no idea about one way
21 or the other, and that is the question of what was within
22 the knowledge of the U.K. law enforcement and regulators.

23 And if that is so, as I've explained to
24 plaintiff's counsel, then merely say we're not making that
25 contention.

1 And if they say they're not making that
2 contention, then they don't have to say anything more.

3 But if they are making that contention, they
4 can't have their cake and eat it too. They can't say we
5 are making a contention, but we're not going to tell you
6 what underlies it.

7 And that is the unifying principle between the --
8 unifying principle that runs through three of the
9 contention interrogatories at issue; 17, 18 and 24. Each
10 of them asks are you contending X with respect to the
11 information that was available to the U.K. law enforcement
12 agencies and regulators in relations to NatWest and respect
13 to 24, the question is are you contending that the U.K.'s
14 decision not to sanction Interpal, or not to bring charges
15 against Interpal, was based on anything other than the
16 merits?

17 And this is extremely, important, Your Honor,
18 because we are going to argue -- and again, this has
19 nothing to do with any notion that these claims are
20 precluded because the U.S. and the U.K. government decided
21 not to proceed against Interpal.

22 It all has to do with Nat West's state of mind
23 and we're entitled to argue that among the reasons why
24 plaintiff's scienter allegations are implausible, is that
25 the U.K. government decided there was no basis charge

1 Interpal. Decided there was no basis to sanction Interpal
2 and NatWest had relied on that as one of the ingredients
3 for what it did.

4 So therefore, if we are going to argue, as we
5 are, that plaintiff's argument that NatWest knew something
6 that the U.K. government has said to this very day it does
7 not now, if we're going to make the argument that it is
8 implausible that NatWest knew something, that the U.K.
9 government has said that it does not know, then we need to
10 know whether the plaintiffs are going to respond to that by
11 saying well, you can't cite what the U.K. government did
12 because it did not have as much information as you did, so
13 therefore the U.K. government's decisions don't impeach our
14 scienter allegation.

15 If they're going to respond to us in that way,
16 then they must identify what it is they say that the U.K.
17 government didn't have that we should have given them.

18 And the same thing with respect to the decision
19 not to sanction. And I'm not making that up out of whole
20 cloth, Your Honor. One of their experts, Gary Walters, in
21 paragraph 241 of his report, said I believe NatWest did not
22 make full disclosure to the U.K. government.

23 So therefore, we're entitled to know whether
24 they're going to meet out argument that the U.K.
25 government's decisions render implausible their allegation

1 that we knew more than our own government did.

2 We need to know whether they're going to respond
3 to that by saying it's because we didn't make adequate
4 disclosure to the U.K. government. Then, if so, what that
5 is.

6 If, as Mr. Israel said, in his August 26th
7 letter, we, the plaintiffs, have no idea what the U.K.
8 government knew, then that's fine. Then tell us you're not
9 making that contention and the issue is moot.

10 Same thing with respect to no. 24, Your Honor.
11 As Your Honor knows, the U.K. government has consistently
12 said we are not going to sanction Interpal.

13 This actually comes up in Parliament from time to
14 time, where members of Parliament seek confirmation that
15 the U.K. government is not going to sanction Interpal and
16 Her Majesty's government confirms that they're not.

17 We need to know whether the plaintiffs are going
18 to respond to our reliance on the U.K. government's
19 decision no to sanction Interpal as something that renders
20 their scienter allegation implausible, because it's
21 implausible that NatWest knew something more than the U.K.
22 government.

23 We need to know whether they're going to respond
24 but that's because the U.K. government, made a political
25 decision, not a decision on the merits.

1 And, in fact, one of their experts at his
2 deposition purported to say well, we all know the U.K.
3 government decides things for reasons. He also said that
4 about the French government.

5 I just need to know are you going to argue that
6 the U.K. government's decision was not on the merits and if
7 so, tell me what your basis is for that so that I'm
8 prepared to meet that argument. That's what contention
9 interrogatories are all about.

10 So that's the theme that runs through the four.
11 Thank you, Your Honor.

12 MR. ISRAEL: Your Honor, if I may, I think first
13 I can safely clarify for plaintiffs that we're not hiding
14 the ball. We're not holding back information. We're not
15 going to later try and use some piece of evidence or
16 documents that we haven't used, or that we haven't produced
17 or that we don't have to somehow prove a point. We're not
18 hiding the ball.

19 But I think what's most enlightening is that in
20 the reply briefs that NatWest filed, they state on the --
21 page 3 in the second paragraph, "NatWest is not seeking
22 discovery from plaintiffs concerning the information that
23 the U.K. authorities had in their possession or what they
24 believed about Interpal. The former is revealed in the
25 information NatWest repeatedly disclosed to the U.K.

1 authorities in those authorities own reports of their
2 investigations, and the latter is confirmed by those
3 authority's repeated decisions not to pursue any charges
4 against or to impose any sanctions against Interpal."

5 What's so important about that passage, Your
6 Honor, is NatWest -- they show clear as day here what
7 they're trying to do. They're trying to say that what the
8 government -- the entire U.K. government, or specifically
9 at least six or seven different departments had in its
10 possession is what we, NatWest, gave them and then the
11 several different reports that the charity commission filed
12 and what the NatWest -- sorry. What the U.K. government
13 state of mind was was demonstrated in the few public
14 reports that the government submitted, namely, the charity
15 commission and the few public statements made by government
16 officials in Parliament.

17 NatWest didn't take discovery in this case on
18 what the U.K. government knew, what it had, what it
19 possessed, what its state of mind was, what its reasons
20 were for not designating Interpal, for not indicting
21 Interpal, for not doing anything with regards to Interpal,
22 but they're trying to make the deduction by saying okay, if
23 plaintiffs don't contend, even though we don't know and
24 can't know what the government had, what its state of mind
25 was, therefore, plaintiff's don't know and what we're

1 saying is well, we gave the government this; we gave the
2 government this. We saw this governmental reports and we
3 know that the government didn't designate. Therefore, this
4 is what the government had in its possession and this is
5 what the government believed.

6 Well, they can't do that. They could have taken
7 discovery. They could have hired an expert. They didn't
8 hire any experts on the issue of what the U.K. government -
9 - what its knowledge was, how it handles cases like this,
10 what its state of mind was. But they didn't do any of
11 that.

12 So they're looking for an evidentiary shortcut
13 here and they show that quite clearly here. They're trying
14 to say that okay; this is what we gave them, and Your
15 Honor, that's why our response to no. 17, which was cross
16 referenced in the other responses, was all we know is this
17 is the information that NatWest had based on the production
18 they gave us, and this is what they gave to the U.K.
19 government.

20 And more specifically what our exhibits to that
21 response included is this is what based on the record we've
22 seen it does not appear NatWest gave to the U.K.
23 government.

24 Did the U.K. government have that information
25 from other sources? We don't know. Certainly, in terms of

1 internal correspondence within NatWest we wouldn't think
2 so, but we don't know that.

3 We don't know if all of the -- for instance, one
4 of the suspicious transactions that NatWest customer
5 Interpal conducted as with the Islamic Charitable Society
6 and we know that they reported one specific transfer.

7 Did they give the U.K. government all of the
8 other transfers that Interpal conducted with that
9 particular entity? We haven't seen any record of that.

10 Did the U.K. government have other information
11 related to those transfers? We don't know.

12 THE COURT: Actually, Mr. Israel, the
13 interrogatory -- at least interrogatory 17, talks about
14 whether or not you contend they had documents beyond what
15 NatWest had. So --

16 MR. ISRAEL: Sure. Your Honor, and that's why we
17 gave them all we could.

18 THE COURT: Well --

19 MR. ISRAEL: All we know is what NatWest had and
20 didn't give. We don't know, as we've said, we don't know
21 what the U.K. government had beyond that. We don't know
22 what it could have gotten from Interpal.

23 And so, again, the problem here is, as Mr.
24 Friedman eloquently said back at the June hearing in Credit
25 Lyonnais, when the issue was Hamas attribution, which

1 clearly plaintiffs carry the burden of proof, clearly
2 there's reams of evidence on that in this case. He said
3 Credit Lyonnais isn't prepared to take a position.

4 Well, respectfully, that issue is at the core of
5 this case. I mean, that's a fundamental issue in this
6 case.

7 The issue of what the U.K. government had, what
8 its state of mind was. We contend that's irrelevant to
9 NatWest's state of mind.

10 But we're even more ill equipped than Credit
11 Lyonnais contended it was to respond to these contention
12 interrogatories because, frankly, we did not -- we did not
13 propound discovery on what the -- I'm sorry. We did not
14 produce discovery on what the U.K. government had --

15 THE COURT: Well, am I hearing you say that the
16 answer is no?

17 MR. ISRAEL: The answer is we don't know. The
18 answer is we're not equipped to take a position --

19 THE COURT: Well, couldn't you just say the
20 answer is no based on what you do know?

21 Mr. ISRAEL: Well, I would repeat Mr. Friedman's
22 concern in the Credit Lyonnais case that using this as a
23 sound bite, where we're made some sort of admission, where
24 we don't think NatWest has met any sort of burden where it
25 could contend what the government knew and what its state

1 of mind was and what documents it possessed and so they're
2 going to then say to Judge Irizarry and say to a jury well,
3 plaintiffs has said -- have acknowledged that they don't
4 know -- that they're not contending what the U.K.
5 government had.

6 They're not contending that the U.K. government
7 had more information than NatWest or what its state of mind
8 was and why it didn't designate Interpal and, therefore,
9 he's what we're telling you and therefore, they've
10 established it conclusively because we didn't have any
11 information to rebut it.

12 So really the roles are reversed here, except we
13 contend not on an issue that goes to the core of this case,
14 but an irrelevant issue as to the state of mind of the
15 government.

16 MR. FRIEDMAN: Your Honor, if I may, your
17 question put the finger on it. Mr. Israel is confusing
18 facts and contentions.

19 I'm not asking him to give me facts. I'm saying
20 are you contending X and Your Honor put your finger on it.
21 You said isn't the answer no. He's repeatedly saying the
22 answer is no, they are not going to contend X. It is not -
23 - the plaintiffs don't have the freedom to say I'm not
24 going to tell you what I'm contending, and I'm not asking
25 him for facts. The Credit Lyonnais analogy is completely

1 inapt.

2 There they asked us --

3 THE COURT: I don't even want to hear about that.

4 MR. FRIEDMAN: Okay. Your Honor -- and again, I
5 am not making this up out of whole cloth. Their expert,
6 Gary Walters, said in his report that we made inadequate
7 disclosure to the U.K. government.

8 And when I deposed him, he confirmed that it's
9 his view that we made inadequate disclosure to the U.K.
10 government.

11 Of course, when I went through every fact that he
12 said was not disclosed, I was able to establish that it
13 does appear in one of our disclosures.

14 So again, with respect -- with great respect for
15 Mr. Israel, he does not have the freedom to say I'm not
16 going to tell you what I contend or not. I'm asking do you
17 contend that NatWest had more information -- had
18 information about Interpal that was not available -- was
19 not in the possession of the U.K. authorities or could not
20 be obtained by them from Interpal.

21 He can't say I pass. He has to say yes, I do
22 contend that or I don't contend it. And that's why we're
23 here.

24 MR. ISRAEL: Your Honor, I would just say to
25 that, if an improper interrogatory, we don't have to

1 contend or not.

2 And I would add to that, in terms of Mr. Walters,
3 what Mr. Walters said, which is exactly what we're saying,
4 is simply NatWest should have disclosed this information
5 and we'll set aside the dispute over the facts and whether
6 or not they were disclosed.

7 But he's not testifying as to --

8 THE COURT: Well, that's interrogatory 18. Let's
9 focus on 17.

10 MR. ISRAEL: Sure. Sure. Sure.

11 MR. FRIEDMAN: The reason I need to know, Your
12 Honor, is, again, I need to know if they are going to make
13 a certain argument in response to my argument.

14 My argument, again, is the authority said we do
15 not know that Interpal is funding Hamas or Hamas terrorism.
16 And I am entitled to argue that the fact that the U.K.
17 authorities say that they did not know this renders
18 implausible plaintiff's argument that NatWest did know it.

19 One way plaintiffs could respond to my argument
20 is ah-ha. That syllogism doesn't work because you may have
21 had information that the U.K. authorities did not have
22 available to them.

23 So I need to know whether they're going to make
24 that argument and what their basis is for making that
25 argument and, again, if they're not making that contention,

1 then we're done.

2 MR. GLATTER: Your Honor, this is Josh Glatter.

3 Just if I can add a few comments to my colleague, Mr.

4 Israel's points.

5 As he noted, the threshold question is whether or
6 not the interrogatory itself is proper before one gets to
7 the secondary question of whether the defendant is entitled
8 to supplementation.

9 There are two things that I think the court
10 should keep in mind in evaluating what decision to reach
11 with respect to all three of these interrogatories.

12 One of them is that many years ago Judge Sifton
13 held with respect to the *mens rea* prong --

14 THE COURT: Well, I --

15 MR. GLATTER: -- that the standard to be applied
16 is whether it was considered a terrorist by the standards
17 of the United States.

18 So there's a question --

19 THE COURT: That's not exactly what he said and
20 his decision was rendered in the context of a motion to
21 dismiss, which given the procedural posture of the case at
22 the time that he rendered decision, you know -- it is not
23 directly applicable to the issue we're discussing today.

24 And I'm not -- I will look -- I have looked at
25 the interrogatory. I'm happily out of the business of

1 drafting discovery requests, but --

2 MR. GLATTER: But my point, Judge, was that it's
3 just that the argument that's being put forward by
4 defendant is, I was going to say -- I'd say minimally is a
5 questionable premise legally and ultimately that will be a
6 legal determination as to whether or not reliance upon a
7 foreign regulator's assessment of the customer and the
8 customer's connections to an FTO.

9 And so that fundamentally turns on the legal
10 questions that will be sorted out either --

11 THE COURT: Well --

12 MR. GLATTER: -- at summary judgment or pretrial
13 motion practice.

14 The second thing which Judge Sifton has
15 consistently held is that the standard for *mens rea* is
16 recklessness, criminal recklessness, as that's been defined
17 under the model penal code.

18 And so in terms of the suggestion that NatWest
19 did not have existential knowledge that the allegations
20 concerning Interpol were correct based on the views of this
21 foreign regulator, and to the extent that's being used to
22 channel a demand for a supplemental response to these
23 interrogatories, or for that matter, to interrogatory 20,
24 I'd submit is incorrect, or at least has to be evaluated
25 under the actual *mens rea* standard.

1 THE COURT: I would have reread his decision a
2 little more carefully if I thought it had been necessary
3 but I think given the procedural posture of the motion, a
4 motion to dismiss based on the allegations of the
5 complaint, I read his holding far narrower and he was
6 simply saying that NatWest doesn't win by claiming reliance
7 on the British authorities.

8 MR. GLATTER: Nor do we claim that now and I
9 think I made clear in my reply letter that that's a strong
10 mischaracterization that I think should not distract the
11 court.

12 All of this bears on our state of mind, which is
13 at the heart of the case, and we're entitled to know what
14 their contentions are about our state of mind.

15 MR. ISRAEL: Your Honor, if I can add one further
16 point, since we're focused on no. 17.

17 You know, the second part of this is what
18 information the government could have possessed -- sorry --
19 could have requested from Interpal and so what Interpal had
20 in its possession, certainly there, if nothing else, we
21 can't know what the government could have done with regards
22 to Interpal.

23 We can't know what information Interpal
24 possessed, you know, and that's why we prepared the exhibit
25 to this response because, again, we tried to include

1 information that we hadn't seen that NatWest had provided
2 the government and that we didn't think Interpal was likely
3 to possess; you know, 17-page transfer confirmations and
4 those sort of things.

5 Obviously, internal correspondence, but you look
6 at this closer on this second part with regards to
7 Interpal, there's just no way for either party to know.

8 MR. ISRAEL: Again, Your Honor, I can make this
9 very easy.

10 If their position is, as stated in the August
11 26th letter, that they don't have the basis to make this
12 contention, then they should say they're not making this
13 contention.

14 But that's not what they did. In their
15 interrogatory response they said we do make this
16 contention. They say there's a multitude -- what was the
17 wording they used? A multitude of pertinent information
18 that was in NatWest's possession that wasn't disclosed.
19 Well, you can't have it both ways.

20 Now, they did contradict themselves in their
21 letter to Your Honor and they said we don't know one way or
22 the other.

23 I hate to repeat myself, but if they don't know
24 one way or the other, then the answer to the interrogatory
25 is no. We'll stop.

1 THE COURT: I agree with -- if you -- if the
2 answer is maybe yes, you can say maybe yes, but you've got
3 to refine your response and the list.

4 Based on what I've heard and what I've read, you
5 clearly do have information regarding what NatWest did
6 provide, so simply attaching a list of all the documents
7 regarding Interpal that NatWest may have doesn't suffice to
8 be as an answer if your answer is, you know, you have
9 reason to believe -- you may make that contention.

10 MR. ISRAEL: I think, respectfully, Mr.
11 Friedman's confusing the two issues in terms of what
12 NatWest provided the U.K. government, versus -- did not
13 provide the U.K. government versus what the U.K. government
14 actually had and that's where the disconnect is, Your
15 Honor, and that's why our answer is, frankly, we don't
16 know.

17 MR. FRIEDMAN: The answer is --

18 THE COURT: Well, I mean, you can break your
19 answer into two parts. There are two parts; did not have
20 in their possession and could not have requested from
21 Interpal information concerning Interpal and the other part
22 is, you know, whether or not it had -- I mean, it is
23 actually one phrase, but it is also whether or not they
24 didn't have in their possession documents that NatWest had
25 in its possession is one -- is whether or not it could have

1 been requested -- requested Interpal information and
2 whether or not NatWest had documents. I think you could
3 break it down to be more specific.

4 MR. ISRAEL: Okay.

5 THE COURT: You know, to the extent that you're
6 going to argue that NatWest didn't disclose information to
7 the U.K. government that it could not have otherwise
8 obtained from Interpal, then you should respond
9 accordingly.

10 Okay. 18, which really --

11 MR. FRIEDMAN: I think it's the same theme, Your
12 Honor.

13 THE COURT: It's basically the same.

14 MR. FRIEDMAN: If their answer to 17 is yes,
15 then the answer is 18 is also yes and they need to tell us
16 what they're talking about.

17 THE COURT: But I do think your Exhibit E is not
18 a responsive document. It's a -- you really -- I assume,
19 have more information at hand that would help you narrow
20 the list and help you better identify the documents than
21 what you have in Exhibit E.

22 MR. ISRAEL: We would agree, Your Honor. 18
23 follows after 17. There's similarities in the two.

24 THE COURT: And then 24.

25 MR. ISRAEL: Again, Your Honor, we would argue

1 that 24 is different and specifically ask why U.K. law
2 enforcement chose to do what it did. Was it based on
3 evidence in its possession? Was it based on any other
4 reason and there's absolute no evidence in this case as to
5 why the U.K. government did not designate Interpal, again,
6 other than a few lines of public testimony given by several
7 individuals in Parliament. We don't know why the U.K.
8 government chose not to designate Interpal. We don't know
9 why it chose not to indict Interpal. It did not. I mean,
10 there' no dispute over that.

11 But again, this gets into the state of mind of
12 the U.K. government, which we still feel is irrelevant and
13 make the interrogatory improper, but even beyond that,
14 again, neither party can simply know why the U.K. law
15 enforcement, which is seven different departments, made
16 some sort monolithic decision to designate or not to
17 designate and why they did so.

18 MR. FRIEDMAN: Then, Your Honor, the answer to
19 the interrogatory is no, because --

20 MR. ISRAEL: Your Honor --

21 MR. FRIEDMAN: Excuse me. Because we are going
22 to say -- we already have said not the straw man, that
23 because the U.K. didn't indict and didn't sanction, that
24 gets us off the hook.

25 Rather, we're going to say look. You're saying

1 that NatWest knew X. To this day, the U.K. government, with
2 all of their resources, say they still don't know X. That
3 makes your allegation about what we know implausible,
4 because it's implausible and it impeaches your allegation
5 that this bank would know more than, as Joel just describes
6 -- as Mr. Israel just described, the seven agencies of the
7 U.K. government.

8 We are entitled to know the following: Are
9 plaintiffs going to respond to that by saying well, the
10 U.K. government's decision not to indict and not to
11 sanction is not indicative of anything because it was based
12 on political considerations, or because it was based on
13 what the queen had for breakfast that day.

14 We're entitled to know if they're going to say if
15 it was based on anything other than the merits.

16 If, as I just heard Mr. Israel say, they're not
17 going to make that contention, then we're done.

18 MR. ISRAEL: You -- I'm sorry, Mr. Friedman. I
19 don't want to interrupt you again.

20 In this case, Your Honor, with respect to
21 interrogatory 24, it's I think -- respectfully it's even
22 further appeals from the party's claims and defenses in 17
23 and 18.

24 17 and 18 at least are touching upon comparisons,
25 or relative access, or possession, vis-a-vis the defendant.

1 This one is purely asking for us to essentially
2 speculate as to a variety of potential reasons, of which I
3 can personally think of many, as to why the British
4 government did or did not decide to take particular action
5 involving Interpal.

6 THE COURT: Well --

7 MR. FRIEDMAN: And obviously we would reserve
8 our right at trial, or at any time up to it, to seek to
9 preclude introduction of evidence on this issue because it
10 could be very prejudicial and confusing to a jury.

11 But with respect to the interrogatory I think
12 because this one is not even really touching at all upon
13 the defendant, it is therefore not related to the party's
14 claims and defenses, notwithstanding Mr. Friedman's heroic
15 effort to link it up to scienter, and as such flunks the
16 basic test of Rule 26.

17 THE COURT: Well, I'll answer that -- I'll
18 respond. There is a connection because if your expert is
19 saying politics and whatever other factors may have played
20 into the decision not to designate Interpal and whatever
21 evidence your expert had presumably is evidence that might
22 be generally available to the public and hence NatWest,
23 that would factor into the argument that you would make
24 about the scienter of NatWest with respect to its
25 transactions with Interpal.

1 MR. ISRAEL: Your Honor, in that regard we can
2 certainly double check it. But my recollection is that
3 although certain of our punitive case-in-chief experts may
4 have narrated the fact that the U.K. government has not to
5 date sanctioned Interpal or taken any other action or
6 agreed to with the U.S. or Israeli designations, I don't
7 believe any of them have proffered opinions in their
8 reports as to why that's the case.

9 It may be that at a deposition one of the
10 defendant's lawyers may have asked them to solicit their
11 opinion on that score, but that does not -- the fact that
12 they may have allowed them to answer wouldn't mean that we
13 were proffering that as evidence in the case.

14 MR. GLATTER: First of all, one of their
15 experts, Mr. -- or Dr. Levitt, did say that he believes the
16 British government had other reasons, but he refused to
17 disclose to us what he thought those were.

18 But it doesn't matter whether their experts have
19 said it or not. If their experts haven't said it, that's
20 another reason why they shouldn't be able to make this
21 contention, because they haven't ventilated it in
22 discovery.

23 THE COURT: So is your -- wait. So is your
24 answer no? Is that what I'm hearing you say, Mr. Glatter?

25 MR. GLATTER: It is my answer that I do not

1 contend one way or the other why the U.K. government --

2 THE COURT: It's not one way or the other. Do
3 you contend or don't you contend? If you don't contend,
4 you don't contend.

5 MR. GLATTER: In other words, the lack of
6 contention is not, therefore, a concession and --

7 THE COURT: It is -- that's right.

8 MR. GLATTER: Correct. And I think I -- subject
9 to concurrence with my colleagues, I think that's pretty
10 much where we --

11 THE COURT: We'll take it as a no, hopefully.

12 MR. FRIEDMAN: All right. Well, that should
13 moot no. 24, because I understand the plaintiffs are not
14 contending that the decision not to sanction Interpal was
15 for any reason other than on the merits.

16 MR. GLATTER: But, Your Honor, just for purposes
17 of record preservation, the fact that we don't contend it
18 is a different matter from whether or not the defendant
19 chooses to open the door on that issue in their case in
20 chief, our ability to rebut it would not be cut off by our
21 failure to affirmatively contend it in respect to this
22 interrogatory

23 MR. FRIEDMAN: Well, that can't be, Your Honor,
24 because that would throw contention interrogatories out the
25 window. That would mean that I could be surprised at trial

1 as to one of their contentions and frankly, Mr. Glatter, in
2 deciding whether to make a contention or not, I'm entitled
3 to know what your rebuttal would be in response to that
4 contention.

5 So it's really -- if anyone is reading this
6 transcript a year or so from now, it's really remarkable
7 that plaintiffs are being so squirrely in refusing to be
8 pinned down on this and it leads me to think that I need to
9 press farther and Your Honor should press farther in
10 finding out what's going on here.

11 The question is very simple; are you making this
12 contention or not? And I am telling you that I may make
13 that contention, but whether I do or not is not excuse for
14 plaintiffs to avoid the issue.

15 MR. ISRAEL: Your Honor, there's nothing
16 squirrely about believing this interrogatories are
17 improper. Obviously, if the court feels differently then
18 that's one thing, but there's nothing squirrely about our
19 position here. There's nothing squirrely about what we're
20 trying to do other than thinking, again, these
21 interrogatories are improper and irrelevant.

22 MR. FRIEDMAN: I'm just reacting to Mr.
23 Glatter's response that he reserves the right to make this
24 contention if I make the contrary contention and he can't
25 do that.

1 MR. GLATTER: Your Honor, there's I think a
2 material different between asking whether or not plaintiffs
3 affirmatively contend something versus our ability to rebut
4 a contention that the defendant plans to make. Those are
5 two distinct issues.

6 MR. FRIEDMAN: There's no difference, Your
7 Honor. And if there were such a difference, then we would
8 have a trial by ambush. We don't have trial by ambush.
9 One of the ways we avoid trial by ambush is allowing for
10 contention interrogatories. This contention interrogatory
11 says -- asks, do you contend X? They've got to answer yes
12 or no.

13 It's not a conditional yes or no. It's yes or no.
14 Their version of the truth is their version of the truth.
15 I'm asking what their version of the truth is. Their
16 version of the truth doesn't change depending on what I
17 say. It is what it is.

18 MR. GLATTER: Your Honor, I don't agree with Mr.
19 Friedman's representations on that score. I think perhaps,
20 however, to save everyone time, it's fair to say that our
21 response to this interrogatory -- it's obviously without
22 waiver of our rights to seek to move in limine on any
23 grounds that we think are appropriate closer to the time of
24 trial.

25 If we believe, in other words, that Mr. Friedman

1 has mischaracterized -- or rather not Mr. Friedman, but
2 NatWest is mischaracterizing or distorting the import of
3 response to a contention interrogatory, obviously, that's
4 something either this court or Judge Irizarry can assess at
5 the appropriate time.

6 MR. FRIEDMAN: So I take it the answer to the
7 contention interrogatory is no.

8 MR. GLATTER: As I said --

9 THE COURT: I just want to hear --

10 MR. GLATTER: As I said earlier, Your Honor we
11 are not going to affirmatively contend or speculate as to
12 the reasons why the British government has not taken a
13 particular action against Interpal.

14 MR. FRIEDMAN: I am concerned only because I've
15 had the pleasure of spending so much time with Mr. Glatter
16 and know how careful a lawyer he is. I'm concerned about
17 his answering the question by saying we will not
18 affirmatively contend. I think we need to know that they
19 will either contend it or not contend it; either
20 affirmatively or defensively.

21 I need to know so that I can decide what
22 contentions I'm going to bring forward and what they're
23 going to say in response.

24 MR. GLATTER: I suppose the problem with this is
25 that, as Mr. Israel alluded to earlier, our fundamental

1 position is that whether the U.K. government did or did
2 not, or have some particular subjective reasons why it
3 chose not to take action against Interpal is utterly
4 irrelevant to this case.

5 Now it may be that at the end of the day somebody
6 disagrees, but because we believe that's irrelevant and may
7 take certain positions with respect to evidence that's
8 sought to be introduced by the defendant in those regards,
9 I have to issue a reservation of rights here.

10 MR. FRIEDMAN: I understand --

11 MR. GLATTER: And, again, I'm being asked
12 through the vehicle of the contention interrogatory whether
13 or not we affirmatively contend X. The fact that we
14 affirmatively contend X, as Your Honor agreed before, is
15 not a concession that, in fact, they did it for the reasons
16 that Mr. Friedman, or Mr. Luft, or NatWest's in-house
17 counsel might suggest.

18 That's an issue that has to wait --

19 THE COURT: Well, let me just ask Mr. Friedman, I
20 assume you are going to say that the British government
21 didn't designate Interpal for -- after a very careful
22 examination, et cetera, and that your reasonably relied
23 on that.

24 MR. FRIEDMAN: What I'm going to say, Your
25 Honor, is here is the admissible evidence of what the

1 British government said. It is a fact that the British
2 government said this. It is a fact that the British
3 government didn't sanction and didn't bring criminal
4 charges -- any charges against Interpal to this very day.

5 It is a fact that NatWest was aware of that. It
6 is a fact that, as Your Honor knows from the
7 correspondence, that NatWest asked the British government
8 what are you going to do and the British government said we
9 have no plans to sanction them or to bring charges against
10 them. Yes.

11 And NatWest -- that was part of what NatWest
12 relied upon in acting as it did. It used the British
13 government as its most relevant authoritative source on
14 this and the British government said it had no basis to
15 bring charges.

16 And I'm also going to argue, subject to hearing
17 what they would say in response, that the very fact that
18 the British government decided not to sanction and not to
19 charge to his very day, parenthetically, in one of the few
20 instances in which the Blair government declined to follow
21 what the then U.S. government asked them to do in relation
22 to the war on terror, which is also significant in and of
23 itself, yes, that that impeaches plaintiff's scienter
24 allegation.

25 And I am entitled to know whether they will

1 respond that the British government's decisions are
2 something that are -- are something that is irrelevant and
3 unreliable because it was based on factors separate from
4 the British government's assessment of the merits.

5 That's my interrogatory and I'm entitled to know
6 whether they're going to make that argument and if so, what
7 their basis for it is.

8 THE COURT: Well, I think what Mr. Friedman is
9 saying is they want to know that you're going to attack the
10 legitimacy of the determination made by the British
11 government in making your argument that NatWest should have
12 known, or that it didn't actually rely, or that it didn't
13 reasonably rely on the determination of the British
14 government.

15 MR. FRIEDMAN: Your Honor --

16 THE COURT: And that's why I said you could say
17 you don't contend, but you could still respond to some of
18 the defendant's contentions regarding its scienter without
19 implicating the merits of the decision by the U.K.
20 government.

21 MR. ISRAEL: Understood, Your Honor. And Mr.
22 Friedman just exemplified the problem with these
23 interrogatories, understanding we're probably ready to move
24 on, but we hadn't heard about the Blair government and its
25 view towards what the U.S. does and its rare decision to

1 buck the U.S.

2 MR. FRIEDMAN: That was just an editorial comment
3 in Brooklyn on a Thursday afternoon. That's not --

4 THE COURT: That's (inaudible). All I'm just
5 saying is if you say now you're not prejudiced, you're not
6 constrained in attacking the defendant's reliance on the
7 British government's decision. But if you do say no, you
8 are constrained in attacking how that decision was made.

9 And so it's really more a focus on whether or not
10 you're going to attack the decision making process and the
11 ultimate decision as opposed to attacking NatWest's
12 reliance on that determination.

13 MR. GLATTER: But, Your Honor, I think that this
14 highlights a very serious problem with the interrogatory,
15 which is it's one thing to say that's not something I
16 contend.

17 And it's another thing to say that's not
18 something I contend and, therefore, it should be inferred
19 from that that the reason that the British government took
20 this action is because it was -- because, in fact, the
21 evidence in the British government's possession was
22 insufficient to warrant that action.

23 Those are two different -- it's one thing to say
24 that's a not a contention I'm making in my case in chief.
25 It's another thing to say it's not a contention I'm making

1 and, therefore, you should infer that I agree with the
2 supposition baked into this interrogatory. That's our
3 concern.

4 And that's why I made my remark about reserving
5 rights in terms of if the defendant is able, or intends to
6 present evidence and suggests that the evidence was
7 insufficient in the U.K. government's -- I don't know how
8 they'd be able to do that, because I don't know how they
9 know why or what the U.K. government in its entire guise
10 knew or --

11 THE COURT: You're worried about the defendant
12 taking that contention?

13 MR. GLATTER: Correct. If the defendant -- in
14 other words, the fact that I don't make the contention does
15 not, therefore, mean that I should -- if the defendant so
16 contends that the U.K. government did not sanction Interpal
17 because the evidence in its possession was insufficient,
18 that I do not have an ability to rebut that if -- and if
19 that is even allowed into evidence on relevancy grounds.

20 MR. FRIEDMAN: Your Honor, he's arguing the
21 relevancy of this. I'm not asking him to concede that the
22 British government was right. I'm asking him to tell me
23 are you going to argue that the British government made its
24 decision based on factors other than its perception of the
25 merits. That's it.

1 MR. GLATTER: And if I say -- well, again, if I
2 say I am not going to argue that in my case in chief, Mr.
3 Friedman's position seems to be that I also cannot respond
4 to it if it's raised in the defendant's case in chief, and
5 that's troubling.

6 THE COURT: All right.

7 MR. FRIEDMAN: And my response is that case in
8 chief rebuttal doesn't matter. Are you making the
9 contention --

10 MR. GLATTER: Which is --

11 MR. FRIEDMAN: Excuse me. He keeps --

12 THE COURT: Mr. Friedman, let me get down to a
13 practical level. The concern is that you will be making
14 that contention.

15 MR. FRIEDMAN: I will.

16 THE COURT: You will.

17 MR. FRIEDMAN: I will be contending that the
18 British government's decision was based on its perception
19 of the merits, that I'm going to be presenting the British
20 government's position and there it is.

21 And I am entitled to know whether they're going
22 to try to impeach that decision with an argument that those
23 who published that decision based their decision on
24 something other than their perception of the merits. And
25 that's all it is.

1 And plaintiffs I've heard say repeatedly this
2 afternoon, we are not going to make that contention
3 affirmatively, but we reserve the right to make that
4 contention in response, and they can't do that.

5 Contention interrogatories are not divided among
6 case in chief contention interrogatories and rebuttal.

7 I'm entitled to know whether they're going to
8 make that argument at any time.

9 MR. GLATTER: Your Honor, in the hopes of
10 truncating this discussion, I don't know what a rebuttal
11 contention is.

12 My point was that to the extent that the
13 defendant intends to present that argument and that
14 evidence, obviously, we reserve our rights to object to it
15 and we reserve our rights to rebut it in some fashion at
16 trial, if it comes to that.

17 I thought that I had saved everybody time by
18 saying --

19 THE COURT: Well, I guess it can come to that.
20 You're referring to (indiscernible) that he will make that
21 contention (indiscernible).

22 MR. GLATTER: But if ultimately he wants at
23 trial to wield a response to a contention interrogatory
24 somehow precluding us from offering any rebuttal, anything
25 to suggest to a jury that there might have been other

1 reasons for that, if and only if that is allowed into
2 evidence, I would presume that all parties reserve their
3 rights as to the introduction of the contention
4 interrogatory into evidence and that will be dealt with at
5 a later time. I'm not quite sure why we have to have the
6 fight today.

7 MR. FRIEDMAN: Your Honor, Mr. Glatter, with all
8 due respect -- and I don't mean this to be pejorative --
9 did just a complete 180. He has been saying -- he and Mr.
10 Israel have been saying for 20 minutes, we're not going to
11 make that contention because who knows why they decided
12 what they did.

13 Well, respectfully, they do know why they
14 decided, or what they say is the reasons they decided
15 because these decisions are not just yes or no decisions.

16 We have the Charity Commission reports, we have
17 statements by Her Majesty's government. So there is
18 evidence.

19 Mr. Glatter, after telling Your Honor for 20
20 minutes we're not making this contention, just did a 180
21 and told Your Honor we are going to make this contention in
22 response to their making the contention that Friedman says
23 he's going to make and I'm entitled to know -- and what I'm
24 now hearing is the answer to the contention interrogatory
25 is yes and if it's yes, then I'm entitled to have discovery

1 as to what are the bases for saying the decision was based
2 on anything other than the British government's perception
3 of the facts.

4 THE COURT: (Indiscernible) if you're going to
5 challenge that contention (indiscernible).

6 MR. ISRAEL: Okay. So that I understand Your
7 Honor's ruling, in other words, if at any time we believe
8 that there might have been other reasons beyond the
9 evidence in hand, then those should be identified in the
10 responses.

11 THE COURT: (Indiscernible).

12 MR. ISRAEL: Okay. I understand, Your Honor.
13 Thank you.

14 MR. FRIEDMAN: And on our motion, Your Honor,
15 that leaves contention interrogatory no. 20, which asks the
16 plaintiffs to list, as supplemented by our meet and confer
17 in bullet points, the actions that they believe the bank
18 should have taken or should have refrained from taking to
19 avoid liability.

20 Their response is that that is inviting
21 speculation and it invites them to provide an answer on
22 something in which they don't bear the burden of proof and
23 I just don't understand that.

24 It's not speculative because we're saying if you
25 contend there are actions that we should have taken or

1 should have refrained from taking, please tell us what
2 those actions are. It's no speculation. We want them to
3 answer only with the actions they plan to contend we should
4 have taken or refrained from taking.

5 And as to burden of proof, if there are actions
6 they say we should taken or refrained from taking, they
7 bear the burden of proving that.

8 A simple analogy, Your Honor, if someone is sued
9 for failure to maintain a sidewalk and part of the case is
10 you should have done X, Y and Z in order to maintain the
11 sidewalk better, then the plaintiff has to identify what
12 the remedial actions are. The same thing here.

13 MR. ISRAEL: Your Honor, if I may, I think Mr.
14 Friedman partially cites our issues with this
15 interrogatory.

16 I think fundamentally our biggest problem with
17 this interrogatory, as you'll recall, interrogatories no. 1
18 and 2, which are identical to the ones that were proffered
19 by Credit Lyonnais, lists all the reasons -- if you think
20 that the respective bank violated Section 2339(b) and
21 2339(c) of the ATA, essentially, what's your basis?
22 Essentially lay out your whole theory of the case.

23 And really that's what no. 22 is doing also.
24 It's just flipping it in reverse. Instead of saying why did
25 you violate it, what could you have done to avoid violating

1 it?

2 So in response to no. 1, based on what the court
3 ordered with Credit Lyonnais we gave the five-page
4 narrative. We reviewed every single deposition, every
5 single page of paper that was produced by Nat West and was
6 produced by plaintiffs in this case to identify what we
7 thought was irrelevant documents and testify.

8 And so we acted entirely in accordance with Your
9 Honor's instructions and frankly, no. 20 just seems to be
10 another way of trying to skin the cat. It's just asking
11 the same question in reverse.

12 It's entirely over broad. It's entirely improper
13 and would require a case-by-case analysis of transactions,
14 of internal correspondence.

15 You know, Mr. Friedman says that we can just
16 provide bullet points, which in terms of setting up the
17 document makes it sound simpler, but there's really --
18 using bullet points doesn't make it any easier.

19 I mean, the entire response to everything NatWest
20 should have done to avoid -- could have done, shouldn't
21 have done to avoid being liable under the ATA, it's
22 massive, just as it was in no. 1 and no. 2. And there's
23 really no difference.

24 We did -- we understook the effort and we spent
25 dozens of hours to look through the record and to provide

1 the response that we did.

2 And if you look at our response to no. 1, we laid
3 out a lengthy narrative, which is just as applicable to
4 this response as it was no. 1 and to no. 2.

5 And so it's just unclear -- what are they asking
6 for separate from what Your Honor ordered us to do in
7 Credit Lyonnais, which is really the same thing here.

8 THE COURT: There are -- you could be challenging
9 their failure to institute certain bank policies and
10 procedures that might enable the bank to -- really to
11 ascertain that something was happening that should have
12 made them aware of what was going on with Interpal and
13 (indiscernible) customer policy that was in effect at the
14 time. I don't know. I have no idea.

15 You know, it is a difficult question to answer
16 because to a certain extent when you're asking about
17 omissions, you might not be able to identify all the
18 omissions, but I think you need to make a good faith effort
19 to try to any (indiscernible) that you may need contending
20 that the bank didn't -- that they didn't (indiscernible) on
21 your radar screen.

22 Aren't you going to contend they didn't follow
23 the know your customer policy and failed to take whatever
24 measures were necessary?

25 MR. GLATTER: Well, Your Honor, as defense

1 counsel's often apt to remind us, this is obviously not a
2 negligence case.

3 So the question from our standpoint and the
4 problem -- a lot of the problem here focuses on the term
5 "avoid."

6 Our position, which I think is reflected in the
7 response and the supplemental response is that the
8 defendant is obligated under 2239(b) not to provide
9 material support to a foreign terrorist organization.

10 And under the applicable mens rea standard that I
11 alluded to earlier, is that when they -- when they --
12 whether or not that means they consult with a barrister or
13 how they decide to go about investigating suspicions is not
14 our burden, is not our issue.

15 Our issue, which we'll demonstrate, is did the
16 defendant, with a culpable mental state, provide material
17 support to Hamas, a foreign terrorist organization.

18 Ultimately, ways in which they could have avoided
19 doing that is not something that we bear the burden of
20 demonstrating.

21 It's not particularly relevant to the claim and
22 if you were to take word "avoid" out and you were to flip
23 this interrogatory to say if you contend that we're liable
24 under 2239(b), tell us why, that would pretty much convert
25 it into a blockbuster interrogatory, the kind that's

1 typically prohibited by courts.

2 And this kind of combines the problems with that
3 approach with adding in an irrelevant consideration, one
4 that isn't our burden, as to how from a business judgment
5 standpoint they could have best gone about assuring that
6 they weren't pipelining funds to a U.S. designated foreign
7 terrorist organization, and that's why we believe that the
8 response that's been provided is sufficient and shouldn't
9 require us to engage again in exercises in speculation as
10 to what the best method the defendant could have considered
11 using to make sure it didn't run afoul of that legal
12 prohibition.

13 MR. FRIEDMAN: I think Your Honor knows that
14 that's not what we're asking them do and invite Mr. Glatter
15 to read the interrogatory and the response, because the
16 response is merely a tautology.

17 The question asks if you contend there are
18 actions we should have taken, or there are actions we
19 should have refrained from taking in order to avoid
20 liability under these statutes, identify what they are.

21 Their answer is tautological and they say you
22 shouldn't have violated the statute.

23 You can't respond to contention interrogatories
24 like that just by saying you shouldn't have violated the
25 statute. You shouldn't have put yourself in a position

1 where you would get sued.

2 This interrogatory does not ask them to speculate
3 on what we did. It doesn't ask them to speculate on what
4 we should have refrained from doing.

5 It says if -- if -- if you contend there are
6 actions we should have taken or actions that we did take
7 that we should have refrained from taking, as a result of
8 which in both instances you claim we're liable under the
9 statute, tell us what those actions are.

10 I can't imagine anything that is more elemental
11 to a contention interrogatory than to ask that question.

12 MR. ISRAEL: Your Honor, again, though I think
13 that's you looked no. 1, is because Mr. Glatter said really
14 the reverse of no. 20 is no. 1, which, again, Your Honor,
15 ordered us to provide a response, which we did.

16 We gave five pages of a narrative which would be
17 directly responsive to no. 20.

18 And that's why we -- we didn't, as Mr. Friedman
19 said, just object and use some tautology, but we referenced
20 our response to no. 1, which provided this narrative.

21 THE COURT: Well, I think (indiscernible) what the
22 defendant wants is to identify a series of transfers which
23 identifies --

24 MR. ISRAEL: But there are hundreds -- there are
25 thousands in this case.

1 THE COURT: You don't have to identify all of
2 them. You could say transfers beginning such and such a
3 date to such and such entities.

4 MR. ISRAEL: You know, again, the concern comes
5 back to I guess the concern we had with interrogatory 1 and
6 2 where providing all of the information in such a
7 blockbuster interrogatory would be massive and near
8 impossible from what your -- if what I understand Your
9 Honor's asking us to do is generally were there transfers
10 to certain entities that NatWest should not have
11 undertaken.

12 Were there -- well, that's the example Your Honor
13 gave, then perhaps it becomes more limited, but again, our
14 concern with interrogatories 1 and 2, which is the same
15 here, is NatWest then waves this in front of a jury. Waves
16 this in front of yourself or Judge Irizarry and says see,
17 here. This is the totality of plaintiff's response, and in
18 such a massive interrogatory that implicates thousands of
19 document and reams of testimony, that's impossible.

20 And so they're trying to then cut us off,
21 regardless of what we say that this is plaintiff's answer.
22 They're stuck within these four corners.

23 We're not trying to hide the ball. We're not
24 trying to hide our contention. That's why our response to
25 no. 1 was rather vigorous, and we spent a lot of time

1 preparing the narrative and the exhibit.

2 But if we're asked to beyond that in no. 20, then
3 we're back in the position of the bank trying to limit us
4 when they asked an improper interrogatory.

5 It's just difficult to know how we could respond
6 to such an interrogatory that literally involves hundreds,
7 thousands of transfers dating over a period of -- really
8 over ten years.

9 THE COURT: (Indiscernible).

10 MR. FRIEDMAN: If one of the bullet points is
11 that we shouldn't have made transfers from one day to
12 another, that's one of the bullet points. But there might
13 be other bullet points.

14 And again, I'm not asking them to make things up.
15 They know what their contentions are. They're obligated to
16 list them.

17 So if Mr. Israel -- if one of the actions you say
18 you should have taken is to block transfers X, Y and Z,
19 that's one of your bullet points.

20 But if there are other things you say that we
21 should have done, or that we did do that we shouldn't have
22 done, in order to avoid a trial by ambush, I'm entitled to
23 know what those are.

24 MR. GLATTER: Your Honor, I'd respectfully
25 submit that again that essentially converts this, or frames

1 this interrogatory as a blockbuster interrogatory.

2 It's essentially saying tell us why we're liable.
3 Tell us why you're going to win at trial, and that's not a
4 proper use of contention interrogatories which is supposed
5 to be a lot more specific.

6 Issues about block transfers about obviously set
7 forth in expert reports. Those issues can be framed more
8 succinctly at summary judgment, should that occur.

9 And, again, the bottom line is that the
10 defendant, as a legal matter, is obligated to avoid
11 providing financial services to Hamas.

12 How it chooses to go about making sure it
13 fulfills that legal obligation is the defendant's business,
14 not ours, and is not something that we should respectfully
15 be put in the position of having to speculate about.

16 THE COURT: All right.

17 MR. GLATTER: And that is what the
18 interrogatory, as crafted and frankly I believe as
19 designed, is asking us to do.

20 THE COURT: Well, I would think that -- and it
21 ties into the example that I gave you that there might be
22 some point in time that you would say very clearly
23 transfers should have been made or (indiscernible).

24 MR. ISRAEL: There are many points in time, Your
25 Honor. I think that's --

1 THE COURT: Okay. But that's (indiscernible)
2 identify all the transactions.

3 MR. ISRAEL: Again, we just want to have a clear
4 understanding because I think Your Honor and plaintiffs
5 both are struggling with what information exactly we'd be
6 expected to provide in response to this interrogatory. I'm
7 still not sure.

8 I understand transfers generally what the court
9 said, but you get into reports they should have filed, when
10 they should have filed them, when they should have retained
11 more KYC information, which frankly, you know, probably
12 should have happened more often continuously.

13 THE COURT: Well, you don't have --

14 MR. ISRAEL: It's just endless --

15 THE COURT: -- identify each subsequent point in
16 time. You could say as of such and such a date, and, you
17 know, periodically whenever. I would think that after the
18 obligation arises to make inquiry that it would continue to
19 some point in time (indiscernible).

20 Or if you say (indiscernible) such and such a
21 date there was reason to proceed --

22 MR. FRIEDMAN: Your Honor, I guess I would only
23 ask, and I apologize if I'm reiterating a point Mr. Israel
24 made, how is that information not already captured in the
25 response and attachments to interrogatory no. 1, which asks

1 if we contend that we knowingly -- NatWest knowingly
2 provided material support or resources to Hamas that the
3 scienter is sufficient to render it liable for damages
4 under 2339(b)(A)(1), please specify the basis for those
5 contentions.

6 And both through the narrative in the responsive
7 and the attachments, the response proceeds to do that.

8 So I think minimally there's an obvious
9 redundancy here.

10 THE COURT: That wouldn't be the first time that
11 that happens in a discovery request.

12 MR. ISRAEL: Well, that's why we referenced
13 interrogatory no. 1 --

14 THE COURT: Look. You can reference it, but
15 you've heard what I've said, so we'll move on.

16 On the plaintiff's motion to compel --

17 MR. GLATTER: Your Honor, before you move to the
18 -- only because it may be tied -- I know Your Honor
19 received a letter briefing from both myself and Mr.
20 Friedman regarding a request to produce certain documents,
21 which were referenced in Mr. Friedman's motion to compel.
22 So I don't know if you want to take that up now or --

23 THE COURT: That's fine. I can --

24 MR. FRIEDMAN: Your Honor, I --

25 THE COURT: Let me tell you exactly why I ruled

1 the way I did back in 2008.

2 It was one of my earlier rulings in this case and
3 it wasn't clearly expressed in my original minute order,
4 but I made a very clear finding as to relevance and what I
5 didn't say expressly in my order is that it was -- I was
6 considering the arguments of the bank as to burdensomeness
7 and also the plaintiff's desire for discovery, which beyond
8 that cutoff date when the account was terminated, which I
9 had no problems with, but we all agreed that the relevance
10 of that information became more attenuated.

11 So it really -- that one-year cut off date was
12 alluded to originally by the plaintiffs in one of their
13 letters, even though they sought a longer cutoff date -- I
14 think through the present or through 2007.

15 MR. FRIEDMAN: It was through the present.

16 MR. GLATTER: Originally through the present --

17 THE COURT: Yes. But you had talked about a one-
18 year date -- one year time frame and then you were -- and
19 then you changed.

20 So after considering the arguments, what weighed
21 heavily into my setting of that deadline originally was the
22 fact that the plaintiffs were willing to consider the one-
23 year. It was clear to me that they were entitled to
24 discovery beyond the 2004 date and weighing the
25 burdensomeness to the defendant against the marginal

1 relevance, I thought that was a reasonable cut off date.

2 Now I'm going to grant the motion because it's
3 not burdensome for the defendants at this point to produce
4 the report and I don't want any future dispute that arises,
5 in case there is any kind of reference to the report by the
6 defendants, because I'm sure you will regale Judge Irizarry
7 with this nice history of things that the bank did and I
8 don't -- it's not burdensome.

9 MR. FRIEDMAN: But Your Honor, first of all, we
10 are not going to rely on it in our defense and if anything,
11 our citation of in connection with the litigation over
12 these contention interrogatories makes it relevant only to
13 the litigation of the contention interrogatories, not on
14 the merits of the case.

15 But how is it relevant? Your Honor, the
16 plaintiffs contend that NatWest had a certain state of mind
17 as of the date of the last attack, September 25 or
18 September 24th, 2004.

19 How is it relevant what the bank said to the
20 British government two years later?

21 THE COURT: We went over this three years ago.
22 Documents as of -- after September, 2004 may have bearing
23 on your state of mind prior to 2004 and that happens all
24 the time.

25 MR. FRIEDMAN: Well, what I'd like to do, Your

1 Honor, if I may propose this course, I can represent to
2 Your Honor that these disclosures that were made to the
3 British government don't say anything about the events
4 previously.

5 All they say is Interpal has presented a check
6 from someone else who was designated as an SDGT and we want
7 you to know about that. And then whey they represented the
8 check there was another disclosure made.

9 If Your Honor believes that -- as Your Honor just
10 said, these may have relevance to the relevant time period,
11 which ends September, 2004, I would like to submit these
12 disclosures to Your Honor in camera and Your Honor can
13 confirm that they don't say anything about the prior
14 period. They just talk about the fact that these checks --
15 it's two documents -- that these checks were presented in
16 2006. That's all they say.

17 THE COURT: The relevant time period goes beyond
18 September --

19 MR. FRIEDMAN: Your Honor, it couldn't because
20 they're alleging --

21 THE COURT: I take it back. The relevant time
22 period does end September, 2004, but the discovery that
23 would arguably yield admissible evidence post dates
24 September, 2004 and that's what I ruled before and I'm --
25 if anything, you're going to make me reconsider my ruling

1 and think maybe the cut off date was too early. But I'm
2 not going to do that.

3 MR. FRIEDMAN: I'm just inviting Your Honor to -
4 -

5 THE COURT: I'm not going to do that. Just
6 provide it.

7 MR. FRIEDMAN: All right. We'll provide the two
8 reports.

9 MR. GLATTER: Your Honor, I just have one
10 clarification. I understand Your Honor's order. As you
11 may recall, we also did request to put the disclosures in
12 context and for the very reasons that you just mentioned
13 that they're -- from an -- the likelihood of leading to
14 admissible evidence, communications and documents that
15 concern those disclosures.

16 And I'm not sure whether or not your order
17 contemplates production of those materials as well. I'd
18 respectfully argue that they absolutely are, particularly
19 when one considers that the entity that --

20 THE COURT: Mr. Glatter, I mean, based on what
21 Mr. Friedman says, I'm going to require him to produce
22 those reports and if you really feel there's some relevance
23 that can be gleaned from the supporting documents, then
24 you'll come back to me.

25 MR. GLATTER: I understand, Your Honor. Thank

1 you.

2 MR. FRIEDMAN: The last issue, Your Honor, I
3 think is their motion to compel, their contention
4 interrogatory 22.

5 MR. ISRAEL: That's correct, Your Honor, and I'll
6 be brief.

7 We know at this point that NatWest is going to
8 say it had proper policies and procedures with regards to
9 suspicions of terrorist financing and if those suspicions
10 led it to believe it should close an account, it would have
11 done so.

12 We know it's going to argue that with regards to
13 Interpal it followed its procedures and policies properly.
14 It determined that it did not need to close those accounts
15 and, therefore, it did not do so.

16 But as it acknowledges in the specific contention
17 interrogatory, NatWest also takes a position that it did
18 close accounts and, therefore, there is apparently a
19 standard that NatWest followed when they decided to close
20 these other accounts.

21 This is really a narrow, simple issue and we're
22 really not asking for much information. We narrowed the
23 scope of our request -- of the contention interrogatory
24 significantly with Mr. Friedman in just asking for the
25 basis, the specific basis, and that's significant because

1 the key compliance employee at NatWest during this time,
2 Mr. Hossesan (ph), one of the primary policy employees
3 during this time, Ms. Gale, they both testified that sure,
4 on a case by case basis, they might assess these accounts,
5 but both of them said that they needed to see the criminal
6 conviction, or they needed to see a U.K. designation. They
7 needed to see some finite piece of data to convince them to
8 close these accounts.

9 The only way we can test their position that
10 they're saying that NatWest thoroughly followed its
11 procedure for Interpal and decided not to close those
12 accounts, and that decision was proper in accordance with
13 its own policy setting aside anything else, is by testing
14 how they treated these other customers, where obviously
15 they decided okay, we need to close these accounts.

16 And with Friends of Al Aqsa, for instance, one of
17 apparently at least five customers that NatWest did decide
18 to close, and temporarily in this case -- in fact, Friends
19 of Al Aqsa, there was no designation. There was no
20 criminal conviction.

21 It was simply the case that in late 2004
22 NatWest decided to close the Friends of Aqsa accounts on
23 suspicions of terror financing.

24 They reversed that decision a few weeks later
25 when they received a lot of pressures and they decided it

1 wasn't worth it and they reopened the accounts. And the
2 actual reasons we can -- you know, that's irrelevant in
3 terms of why they decided to reopen the account.

4 But they decided to close the account without any
5 criminal conviction, without any U.K. designation, which is
6 contrary to the testimony of Mr. Hossean and Ms. Gale and
7 Mr. Friedman -- excuse me. NatWest's letter
8 mischaracterized saying that Mr. Hossean simply said well,
9 it was a case by case basis.

10 He ultimately said sure. They look at the facts
11 of each case, but he gave us specific reasons he could
12 think of why they would close customer's accounts and for
13 NatWest to take the position that this somehow is not
14 relevant, Interpal obviously -- Interpal's accounts weren't
15 in a vacuum. It wasn't the one account of NatWest it just
16 focused on with tunnel vision.

17 Certainly, there are these other accounts that it
18 decided to close at the same time it was continuously
19 deciding to keep Interpal's accounts open, in spite of what
20 we contend were continuing alarm bells that should have
21 gone off.

22 And so again the only way that we can test, based
23 on NatWest's own policies, what would actually lead it to
24 close accounts, because it didn't do so for Interpal, is by
25 looking at these comparatives.

1 And that's why when we had these meet and confer
2 sessions with Mr. Friedman we said if -- whether it was
3 five customers, seven customers, however many it was, if it
4 was because each was designated by Her Majesty's Treasury,
5 fine. Say that.

6 And we're not asking for -- we're not getting
7 into provide us with the account documents. Provide us with
8 the transactional records.

9 We're not getting into any of that. These aren't
10 requests for production.

11 This is simply NatWest is contending that even
12 though it didn't close Interpal's accounts on suspicion of
13 terror financing, it did decide to close others. And we
14 simply want to know why.

15 MR. FRIEDMAN: Your Honor, Mr. Israel's argument
16 just proved why this is irrelevant. This case is not about
17 whether NatWest acted consistently with its policies or
18 consistently with its actions in other instances in
19 deciding not to close Interpal's accounts. That's not what
20 this case is about.

21 Mr. Israel just said the only way we can test --
22 the only way we can test. Test what? What is it issue in
23 this case is not whether we should have closed the
24 accounts. It's not a negligence case. We're not on trial
25 for failing to follow our own policies.

1 The only relevant test is did we know, or as they
2 argue, were we willfully blind to whether Interpal --
3 Interpal -- Interpal was financing Hamas or Hamas
4 terrorism.

5 What we did with other customers has nothing to
6 do with this at all and this is a complete fishing
7 expedition.

8 If it turns out that other customers were closed,
9 or were not closed, or there were reasons that the
10 customers were closed, reasons that the customers were not
11 closed, so what? It's completely irrelevant. It has
12 nothing to do with the issue at hand.

13 And there's a bit of a shell game going on here.
14 They're saying the want to know about this so that they can
15 test NatWest's reasons for not closing Interpal.

16 This case is not about the legitimacy of
17 NatWest's reasons for not closing Interpal. It's whether
18 NatWest knew or was willfully blind to whether Interpal was
19 funding Hamas or Hamas terrorism. So it's just completely
20 irrelevant.

21 MR. ISRAEL: But Your Honor, the credibility of
22 the testimony of these witnesses who said they had to have
23 some genuine suspicion and what exactly was a genuine
24 suspicion, which apparently they never had with Interpal in
25 spite of the U.S. designation, in spite of everything that

1 went on, again, what we saw with Friends of Al Aqsa is
2 apparently there was a lesser standard for that customer.

3 MR. FRIEDMAN: Well, I'm surprised --

4 THE COURT: Well, wait. Stop. Stop.

5 MR. FRIEDMAN: -- that Mr. Israel would say that
6 --

7 THE COURT: Stop. Stop.

8 MR. FRIEDMAN: -- because we did suspect them.

9 THE COURT: Mr. Friedman, why didn't you just
10 follow up with discovery after the Hossesan deposition?

11 MR. ISRAEL: Well, Your Honor, for instance, with
12 Mr. Hossesan's deposition, I believe the cut off to proffer
13 written discovery was March of '010. We deposed Ms. Gale in
14 later October of '010. She was the last one, because she
15 was a Hague witness. She happened well after the close of
16 discovery and then we moved onto experts.

17 I mean, frankly, that's why we're not saying --
18 we're obviously not asking at this late date for documents.

19

20 MR. FRIEDMAN: Mr. Israel, please. You made
21 follow up requests --

22 MR. ISRAEL: Can I finish?

23 MR. FRIEDMAN: You made --

24 MR. ISRAEL: Can I finish? As much as you --

25 MR. FRIEDMAN: But, Your Honor, they --

1 THE COURT: Let him finish, Mr. Friedman.

2 MR. ISRAEL: I mean --

3 MR. FRIEDMAN: What he's saying is just not
4 true.

5 THE COURT: Stop. Stop. Mr. Friedman --

6 MR. ISRAEL: Let's not put on a show here and act
7 amused. I mean, let's not make this into a game.

8 THE COURT: You'll get your chance to speak.

9 MR. ISRAEL: Well, Your Honor, again, you're
10 correct. We didn't ask for documents pertaining to these
11 accounts and, frankly, we took -- Your Honor was quite
12 clear a long time ago in terms of the account information
13 that we could ask for and I think we actually made a list
14 and that's why we didn't come back and say give us -- we're
15 not going to undertake this. You know, give us all the
16 transactions, the thousands of transaction for this
17 customer at this late date and then we'll conduct a
18 comparison. We're asking simply why did you close the
19 account. That's it.

20 Which it's astounding to us -- I mean, Mr.
21 Friedman's amused. We're frankly astounded that given that
22 there were at least five accounts that were closed on
23 suspicions of terror financing and they can't find them
24 now?

25 And this Goalkeeper system -- this self acclaimed

1 Goalkeeper system, which was designed to record all
2 suspicions and be able to search those suspicions, they
3 can't search for terror financing and find which accounts
4 were closed? That's just unbelievable.

5 MR. FRIEDMAN: I'm sad for a couple of reasons,
6 Your Honor. I'm sad because Mr. Israel is just saying
7 things that are just not true.

8 First of all, the document that refers to the
9 five accounts was produced to Mr. Israel in 2009. They
10 never made any follow up request about those five accounts.

11 THE COURT: Just correct me if I'm wrong, but I
12 gather they're all accounts involving the same customer?

13 MR. FRIEDMAN: I don't know one way or the other
14 and that's another reason that this is saddening, Your
15 Honor, because there is considerable burden in trying to
16 identify what these documents are. Believe me, if there
17 weren't, we would have told them.

18 Discovery ended more than a year ago. This
19 document was produced in 2009.

20 THE COURT: I know that.

21 MR. FRIEDMAN: This is grossly untimely and it's
22 not a question of stonewalling them. It's a question of now
23 a year after discovery ending, two years after this
24 document is produced, having to go back and look for this
25 information again is just not fair.

1 Now as I represented to the court, and I can
2 represent again today, we have looked into the Goalkeeper
3 system and this information is not self evident. It would
4 have to be an extensive granular search of documents in the
5 Goalkeeper system which would take a substantial amount of
6 time in order to extract this information.

7 And with plaintiffs having sat on this for two
8 years, we should not be required to do that. Enough is
9 enough, especially when considered in light of the
10 irrelevance of this information.

11 MR. ISRAEL: Well, Your Honor, a few points.
12 First, we'd certain take the position that it was made
13 relevant by the testimony of NatWest, which happened last
14 summer and into last fall.

15 It think the other thing is looking at your
16 September '08 order, where you did ask us to make a final
17 list of entities for which we wanted written discovery and,
18 frankly, in accordance with that we didn't then receive
19 this document in the Summer of 2009 and ask for the account
20 file because you gave us this final date and we respected
21 that, certainly, and had no problem with that.

22 But that's why, again, we're not asking for the
23 account file.

24 Again, if NatWest is saying that -- I don't know
25 whether it's had so many accounts its closed on suspicions

1 of terror financing, or there are so few, how can it not
2 know this information? It's simply astounding to us.

3 Again, the Friends of Al Aqsa file showed that
4 the testimony of Mr. Hossesan and Ms. Gale was not
5 accurate.

6 And so we want to know about these other
7 customers as well.

8 MR. FRIEDMAN: We are not saying -- it's tough,
9 Your Honor, when just complete misstatements just get made
10 again, and again, and again.

11 We're not saying we don't have this information.
12 We're saying to ask us to go through the effort to get this
13 information two years after the document was produced, one
14 year after discovery ended is wrong. This information may
15 be in the bank's files, but it would take a tremendous
16 effort to find it.

17 And I've been on the phone with my client over
18 the last three weeks trying to figure out if there is a
19 non-unduly burdensome way in which to extract this
20 information and there isn't.

21 THE COURT: Well, you did offer to continue
22 making a reasonable search for this information. What does
23 that mean?

24 MR. FRIEDMAN: What that means, Your Honor, is
25 if Your Honor directs us to do so, we can continue to look

1 in the Goalkeeper system. And there are ways -- they're
2 very burdensome ways, but there are ways, but there are
3 ways we can continue to look in the Goalkeeper system.

4 But if we have to go back to -- which is an electronic
5 system.

6 If we have to go back to hard copy documents that
7 are all stored in boxes in remote locations -- and these
8 are boxes that we went through four or five years ago to
9 produce documents in response to their request and to tell
10 my client that I now have to go to Iron Mountain and get
11 these boxes back, we can continue to think of strategies
12 for extracting this information from the Goalkeeper
13 database, but anything beyond that would just be
14 unreasonable.

15 MR. GLATTER: Your Honor, if I could just make
16 two points. One is given that these are terror financing
17 suspicions, while, of course, this is not a negligence
18 case. It is a little troubling to hear that it would be
19 that problematic to be able to find something, given the
20 threat level represented by the suspicion.

21 But secondly, we spent no small amount of time
22 this afternoon discussing why it was appropriate to have
23 the plaintiffs supplement their contention interrogatories
24 based on the premise that it was quite relevant to be able
25 to point out the action, or inaction, by the British

1 government is somehow suggestive of the defendant's
2 scienter or mens rea, with respect to its decision to
3 continue doing business with Interpal.

4 I respectfully suggest that it's -- if that is
5 relevant, then it is extremely relevant to know how the
6 defendant winds up treating in house its own terrorism
7 suspicion files that its identified, particularly when
8 those entities, such as Friends of Al Aqsa, have not
9 apparently wound up on the radar of the British government
10 to the same degree as Interpal.

11 One, I would submit that the later is far more
12 relevant than the former.

13 MR. FRIEDMAN: Your Honor, if I may, just one
14 sentence. Thinking about this this morning I was wondering
15 what kind of arguments plaintiffs would make and I was
16 going to say are they going to say that if what we're
17 looking for is relevant, then this is relevant? And sure
18 enough, Mr. Glatter did.

19 The material difference, of course, is that what
20 we're asking about all relates to Interpal. What they're
21 asking about relates to five other customers.

22 Your Honor, if Your Honor thinks that this is
23 relevant, we can continue to look in Goalkeeper and that's
24 where we are.

25 MR. ISRAEL: Your Honor, I would just submit, our

1 one concern again is having an understanding of what the
2 reasonable search is.

3 Again, we laid out we're not -- goalkeeper
4 obviously isn't in any of our systems. We had a few
5 corporate representatives who testified about it and to the
6 best we could, we laid out where it would seem like they
7 could find this information. Obviously, we don't know
8 that.

9 So what we're simply trying to make sure of is a
10 reasonable search, again, seeming like it -- seemingly
11 impossible to us that NatWest could not find this
12 information within its system.

13 We just want to make sure that reasonable means
14 that they're doing everything they can within this
15 goalkeeper system to try to find this information.

16 We're not asking about going to Chicago or
17 wherever the -- however many boxes are held. We're asking
18 about the goalkeeper system here.

19 THE COURT: Okay. I have no problems requiring
20 the defendant to continue search on the goalkeeper system.

21 MR. FRIEDMAN: Okay. We'll do that.

22 THE COURT: Because, you know, to the extent that
23 the treatment was consistent with how NatWest treated other
24 customers, I mean that arguably is relevant and I'm not
25 going to make any arguments for either side, you know, as

1 to what value you can make -- I mean, what you can make of
2 this kind of information.

3 At the most basic level you need to provide the
4 information.

5 I'm a little surprised that it appears -- I mean,
6 do you have the account numbers that were closed, or am I
7 just misreading --

8 MR. FRIEDMAN: No, we don't.

9 THE COURT: Those account numbers deal with a Al
10 Aqsa.

11 MR. FRIEDMAN: The first step is identifying the
12 account numbers. The first step in going through
13 Goalkeeper, because -- but we do not have the account
14 numbers. If we did, we wouldn't be arguing about this.

15 THE COURT: Okay. I'll ask you to continue
16 searching.

17 MR. FRIEDMAN: The Goalkeeper system.

18 Your Honor, the last point is we had agreed that
19 we would set a schedule today for the submission of pre-
20 motion --

21 MR. ISRAEL: Mr. Friedman, without cutting you
22 off, I wanted to get a sense of how long we're going to
23 talk about the supplemental responses, because we had
24 discussed the dates, and I just wanted to make sure in
25 light of the timing we're talking about for supplemental

1 responses that it still makes the schedule work.

2 MR. FRIEDMAN: Well, you tell me. The last time
3 we submitted our pre-motion conference letters before there
4 were supplemental responses. I'm happy to do that.

5 MR. ISRAEL: We did and I think we can still do
6 that. Again, we're balancing this out against -- not this
7 case. We have summary judgment briefing in the other case,
8 so we just want to make sure from a scheduling standpoint -
9 -

10 THE COURT: Well, why don't we talk about the
11 dates for production and then that might inform the setting
12 of the deadlines for the pre-motion letters.

13 MR. FRIEDMAN: I suspect, to be on the safe
14 side, I should have three weeks to do what more I an on
15 Goalkeeper knowing how long it's taken to get to where they
16 are.

17 So that would be --

18 THE COURT: October 6th.

19 MR. FRIEDMAN: October 6th.

20 MR. ISRAEL: Your Honor, I guess in light of what
21 else is going on with these cases and what we may or may
22 not have to do with no. 20 I guess we'd ask for maybe
23 October 13th, just to extend it out an extra week.

24 MR. FRIEDMAN: No objection.

25 Do the dates for the pre-motion letter still work

1 for you?

2 MR. ISRAEL: Yes, I think that's fine.

3 THE COURT: What are the dates for the pre-motion
4 letters?

5 MR. FRIEDMAN: Well, I'm told there will be no
6 plaintiff's summary judgment motion, unlike in the Credit
7 Lyonnais cases, so we propose to submit our pre-motion
8 letter to Judge Irizarry on September 28th.

9 THE COURT: 28th?

10 MR. FRIEDMAN: September 28th. And plaintiffs
11 will submit their response on October 7, and I believe last
12 time Your Honor communicated those dates to Judge Irizarry,
13 who proposed conferences dates to us.

14 MR. ISRAEL: I guess one thing we didn't talk
15 about was page length, which is different, because in
16 Credit Lyonnais we're dealing with two issues; sequencing
17 and the substance.

18 MR. FRIEDMAN: I'm happy to abide by Judge
19 Irizarry's three-page rule.

20 MR. ISRAEL: That's fine.

21 Your Honor, after the Credit Lyonnais motion to
22 compel hearing you submitted a minute order. I'm kind of
23 going through your rulings. Do you plan to do the same
24 here?

25 THE COURT: I try to do that. It's difficult

1 enough trying to remember my past rulings. I try to forget
2 them and I hate Westlaw and Lexis for picking up decisions
3 I'd rather not see again.

4 But let's just talk about administrative matters
5 first.

6 One is just a simple one, which is -- I don't
7 know if you've noticed the four cases that all of you are
8 involved in are linked on the docket sheet and there have
9 been no formal consolidation agreements -- orders with
10 respect to the two sets of cases.

11 I assume the parties don't object to
12 consolidating the two NatWest cases and the two Credit
13 Lyonnais cases.

14 MR. ISRAEL: For purposes of trial?

15 THE COURT: Yes.

16 MR. ISRAEL: Well --

17 THE COURT: Why don't you think about it. I
18 would think it makes sense. We initially basically have
19 treated these -- all four cases as consolidated for
20 discovery cases, but the two sets of cases have gone their
21 separate ways.

22 What I will do on the docket sheet, in case you
23 find some value in it, is to not -- de-link the four cases
24 at this point.

25 MR. FRIEDMAN: I think that's been done, Your

1 Honor. We received notices this week that this was done.

2 THE COURT: No, no. They -- who --

3 MR. FRIEDMAN: We received a notice from the
4 clerk's office that the two NatWest cases would be linked
5 and the two Credit Lyonnais cases would be linked.

6 THE COURT: Okay. Well, then my assistant acted
7 more quickly than I thought.

8 MR. FRIEDMAN: But that the four cases would not
9 be linked together.

10 THE COURT: Right. And so that will enable you
11 and Strauss to file -- to just make one filing in the two
12 cases and you were always able to do that in the Weiss case
13 anyway; link it to any other case.

14 Now on the protective order, what I will do is
15 simply amend I think Section 4(f), dealing with the
16 ceiling.

17 I am issuing an order, you know, as required by
18 the Second Circuit in *Lugosh*, to make specific findings as
19 to the ceiling of the underlying documents; the bank
20 documents and the tracking documents and I'll roll into
21 that the personal information of the plaintiffs.

22 So I do have a question about that, so that we
23 don't have to keep going back and amending the definitions
24 for what can be sealed.

25 I am not touching the original agreements in your

1 designation of what's confidential. I am simply defining
2 the scope of documents that can be filed under seal and
3 what information should be redacted in the order to be
4 issued.

5 So you'll abide by whatever agreements you have
6 on designations. That's not a concern of the court and it
7 makes it a lot easier, so that we don't have to superimpose
8 on the past designations the more limited category;
9 hopefully, more limited categories that we've discussed
10 regarding sealing.

11 I did discuss the matter with Judge Irizarry.
12 Her preference is just simply to have documents that are
13 clearly sealed and documents that are not.

14 I know you've already served the initial set of
15 motion papers, right, in Strauss. So maybe what you could
16 do is have filings -- separate filings for documents that
17 are either redacted or filed under seal. Does that make it
18 too difficult?

19 So, for instance, your memoranda of law will be
20 publicly filed with redactions. If you have supporting
21 affidavits, with sealed exhibits, don't -- I don't want the
22 affidavits to be completely sealed. I don't know if you
23 have the capacity to seal just the exhibit. I'll have to
24 check.

25 We'll work this out with the -- discuss just the

1 logistics of doing this and when you did public file the
2 redacted documents, as you can see from the notice that we
3 filed it, it was very backwards since there was no rhyme or
4 reason to your attachments.

5 So try to be more organized in how you file
6 exhibits and attachments. Don't -- I know it's more
7 onerous for you to file them separately. If you can group
8 them, that's okay, but don't have one exhibit overlapping
9 into another filing -- filed document, because I know there
10 are restrictions on the length of documents you can file.

11 But anyway, if we need a less on that we'll just
12 talk privately with you later about it.

13 Now, the most difficult aspect of the
14 confidentiality order is the redactions that need to be
15 undertaken and I've forgotten to bring down the proposed
16 redactions that both sides submitted.

17 What is telling is in the few cases where there's
18 an overlap in suggested redactions, that the plaintiffs are
19 actually redacting more than what the defendants had
20 proposed.

21 I do have a question about the -- one of the
22 experts who did the number crunching and I know --

23 MR. GLATTER: Mr. Geiser?

24 THE COURT: No. It's a two-name -- Nealy and --

25 MR. GLATTER: Mr. Geiser is the witness from

1 Nigel and Riley.

2 THE COURT: Okay. Anyway, I don't think it's a
3 surprise if I can share with the plaintiff that you did
4 propose -- submit some proposed redactions as to some of
5 the plaintiff's expert reports.

6 So I -- they provide actually a good basis for us
7 to talk about what redactions would be appropriate and you
8 had actually redacted all references to Nigel and Reilly in
9 your -- in one of the reports.

10 A lot of the footnotes -- I can understand
11 redactions relating to customers that -- or transferees who
12 were never identified publicly before, but as to some of
13 the sources of information, a lot of it came from the
14 expert report of Nigel and Reilly and I don't know why that
15 was --

16 MR. GLATTER: If I understand, Your Honor, just
17 so I have it clear in my mind.

18 I think what you're referring to is the fact that
19 certain of our other experts, for example, Dr. Matthew
20 Levitz, may have referenced certain transactions processed
21 by Credit Lyonnais, or by NatWest, as the case may be, and
22 identified by Bates number -- identified within -- I guess
23 in the Nigel and Reilly report, where it referenced
24 transfer --

25 THE COURT: Could you just hold on a sec? Maybe

1 it will be easier if I have Josh go up and if you don't
2 mind, I'll share your proposed redactions?

3 MR. FRIEDMAN: I honestly don't know what Your
4 Honor's referring to.

5 THE COURT: I had asked for representative
6 documents that you might be filing and you would mark the
7 places that you think ought to be redacted.

8 And I gave you the option of filing them -- of
9 submitting theme ex parte and both sides did.

10 So I wanted to -- I would like to look at the
11 expert reports with you and talk through some of the
12 redactions to get a better handle on --

13 MR. FRIEDMAN: If I may, Your Honor, I don't
14 think this is -- that I'm equipped to do it now because I
15 would have to have others of my colleagues who did the
16 redactions --

17 MR. GLATTER: I believe in our case I think Mr.
18 Goldman's office submitted the redactions and so I can
19 certainly give it the college try --

20 THE COURT: Okay. Then maybe we need to --

21 MR. FRIEDMAN: If we could have a telephone
22 conference, if Your Honor wishes --

23 THE COURT: I'd actually like to talk to you
24 before completing my order, because the toughest part of
25 the order is --

1 MR. FRIEDMAN: Can I suggest this to Your Honor.
2 If you would like to just give us a call, or have Mr.
3 Prushesky just give us a call.

4 THE COURT: Well, I'd like to have it together
5 and perhaps to have the -- okay. Then why don't we do that
6 and you'll tell him who we need to talk to.

7 And if you think it would be useful to have a
8 joint -- another -- a conference by telephone, I'll do
9 that.

10 MR. FRIEDMAN: Yes, why don't we do that, if
11 Your Honor proposes to us a time for a telephone
12 conference, we can do that.

13 Because, Your Honor, I think the best thing to do
14 -- another reason to do it that way is that if I can have
15 in front of me that submission that we made, and unredacted
16 versions of that submission, I can tell Your Honor exactly
17 why we did what we did.

18 THE COURT: Well, why don't you come to chambers
19 after this -- you sent me many, many copies.

20 I hopefully won't be getting documents from you
21 in the future but as far as I'm concerned, if you ever send
22 more documents, you can always -- you only need to send me
23 one set because you don't need to do it for every -- for
24 each of the cases.

25 But in any event, why don't we come - I'll show

1 Mr. Friedman what you sent. I have many copies of that. So
2 if that's -- if you feel it's all right for me to share it
3 with the plaintiff's counsel, then I'll give you a set.

4 MR. FRIEDMAN: Okay.

5 THE COURT: But you just marked where the
6 redactions would be, I think. So it's a good working
7 document to -- so I'll meet you upstairs.

8 (Proceedings concluded at 3:45 p.m.)

9 I, CHRISTINE FIORE, Certified Electronic Court
10 Reporter and Transcriber and court-approved transcriber,
11 certify that the foregoing is a correct transcript from the
12 official electronic sound recording of the proceedings in
13 the above-entitled matter.

14
15 

16 September 18, 2011

17 _____
18 Christine Fiore, CERT
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